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Public Service Commission
State of North Dakota

COMMISSIONERS

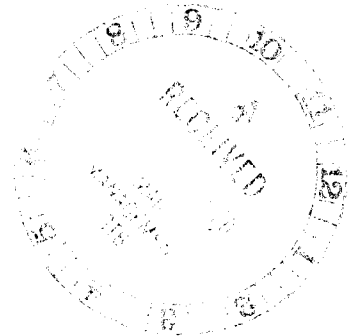
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Executive Secretary
Jon H. Mielke

November 15, 2000

Office of the Secretary
Case Control Unit
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001



Attention: Ex Parte No. 582 (Sub-No. 1)

Gentlemen:

Enclosed for filing in this case are the original and 25 copies of written testimony submitted jointly by the North Dakota Public Service Commission, North Dakota Grain Dealers Association, North Dakota Wheat Commission, and North Dakota Barley Council. As directed, we are also providing a copy of this testimony on the enclosed 3.5 inch diskette formatted for WordPerfect.

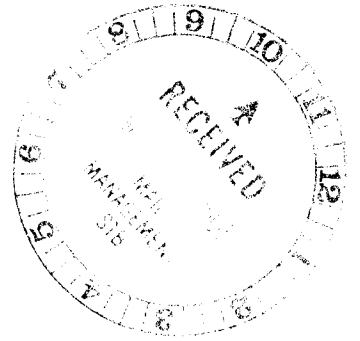
Sincerely,

A handwritten signature of Jon H. Mielke is located below the "Sincerely," text. The signature is written in cursive and is clearly legible.

Jon H. Mielke
Executive Secretary

Enclosures - 25 paper copies of original
1 computer diskette copy of original

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATIONS – PROPOSED RULES

COMMENTS OF THE

NORTH DAKOTA PUBLIC SERVICE COMMISSION

NORTH DAKOTA GRAIN DEALERS ASSOCIATION

NORTH DAKOTA WHEAT COMMISSION

NORTH DAKOTA BARLEY COUNCIL

Due Date: November 17, 2000

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 582 (Sub-No. 1)

**COMMENTS OF THE
NORTH DAKOTA PUBLIC SERVICE COMMISSION
NORTH DAKOTA GRAIN DEALERS ASSOCIATION
NORTH DAKOTA WHEAT COMMISSION
NORTH DAKOTA BARLEY COUNCIL**

Parties - This statement is submitted jointly by the North Dakota Public Service Commission, the North Dakota Grain Dealers Association, and North Dakota Wheat Commission, and the North Dakota Barley Council (North Dakota). These parties participated in the earlier phase of this proceeding and are fully identified in those filings.

Policy Statement - The Surface Transportation Board (Board or STB) appears to be well intentioned in the rules that it has proposed in this proceeding. The proposed policy statement recognizes changes that have taken place in the rail industry and attempts to strike a new balance between the needs of the rail industry and the needs of shippers.

Public interest has always been the focal point of merger applications, but key determining factors are dictated by the environment at the time. Just like an emergency room doctor will pay little attention to a broken arm if the patient is in cardiac arrest, the Board will pay attention to different details depending on the operating and economic environment at the time of a proposed merger.

The Board has acknowledged that the rail industry's economic situation has changed dramatically over the past twenty years and more deference must

now be given to local and shipper interests; especially considering the enormous market power that carriers have managed to acquire. North Dakota commends the Board for acknowledging the changed situation and for taking corrective action. It is hoped that the paradigm shift that is reflected in the proposed rules will be reflected in the Board's handling of other matters involving carrier market power.

Potential Harm & Service Disruptions - The proposed rules make reference to the Board's desire to enhance competition. It is extremely important that this enhancement accrue to the benefit of captive shippers. It would be a travesty if the "balancing test" supported a merger because a large number of non-captive shippers were given even more competitive options following a merger even though a smaller number of already captive shippers received no benefits.

Carriers do not risk much by offering competition-rich shippers more competition. If this did occur, competition-poor shippers would surely become "poorer" since it is typically these shippers who pay the price to help merged carriers finance their expansions. The Board must recognize this situation and stand ready to serve and protect those shippers who are most captive. Revenue to variable cost ratios would be a good indicator of captivity.

The Board's proposed rules take a "you tell us" approach to addressing harms that may result from mergers. The rules call on carriers to suggest remedies to mitigate and offset negative harms. North Dakota believes that carrier proposals must include agreed-to penalties that will automatically be paid if the carrier fails to perform. These penalties must be significant and must accrue to the benefits of aggrieved shippers. Carrier proposals and promises without related penalties would be meaningless and counterproductive. Shippers should be compensated when carriers fail to perform.

It is important for the Board to understand that mergers do not impact shippers simply in the areas of service disruptions and upward pressure on rates. As railroads have gotten larger, they have gained control of an increasing share

of origins and destinations for certain commodities. This puts them in a position to not only charge higher rates, but also to dictate terms and conditions to the shippers and receivers on their lines.

Railroads naturally seek shipper operating systems that are perfectly matched to the railroad's operations. Recent mega-mergers have made it possible for them to demand shipper compliance. The lack of competitive pressure has made it possible for railroads to demand things such as larger shipping volumes and faster loading times. Compliance may carry great costs in terms of capital improvements and increased operating costs. To the extent that the railroads may be able to force shippers to consolidate shipments at fewer and fewer origins, related costs may be paid not only by shippers but also by the public sector in the form of increased highway maintenance expenses.

Carriers may claim that the benefits of these efficiency enhancements are shared with shippers. Unfortunately, it is the shipping community that makes most of the required investments. Ultimately, shippers have no choice but to comply with carrier demands – they simply have no other option.

These shippers already need protection. If enhanced competition is insufficient to protect shippers from this type of abuse, the Board must stand ready to remedy such abuses. The proposed rules should reflect this willingness.

The ability to use interchanges to access markets is another tool that the Board can and must use to enhance competition, or at least to maintain pre-merger levels of competition, in merger cases. The Board must stand guard to insure that gateways remain open, both physically and economically. Physical possibilities are meaningless if carriers have the ability to make an interchange economically impractical. New gateways should be created whenever possible to enhance competition.

Short Line & Regional Carriers - The viability of short line and regional carriers is a major concern to North Dakota. Three such carriers now operate over one-third of the North Dakota's 3,900 mile rail system; each is closely

aligned with the previous Class I operator of that track. Some of these lines have or will become unviable, due in part to the Class I's efforts to concentrate originating traffic at a few select points on its own main line track. These occurrences impact shippers, local communities, roads, etc.

The proposed rules suggest that the STB will depend on private sector negotiations to develop operating plans that address short line and regional carriers. The Class I's extreme market power will make it very difficult to negotiate a settlement that is fair to both entities. The Board must be aware of this fact and must be available to settle disputes, both during the merger review process and once the merger is consummated. The STB must stand ready to insure that such agreements are truly fair to short line and regional carriers and to the shippers and communities that they serve. The Board should presume that the short line or regional carrier is entitled to the protection sought unless the Class I can clearly prove otherwise.

Transnational Issues – This is an extremely important issue to North Dakota. North Dakota's farmers have a great deal of experience with the North American Free Trade Agreement and the problems that "free" trade can cause. "Free" is not always free in both directions. We are concerned that transnational rail mergers will make our seldom-competitive shipping situation even worse.

North Dakota is already served by a transnational carrier (CP Rail) and our shippers must compete with another (Canadian National – Illinois Central). The Board acknowledged North Dakota's plight in this regard when it imposed a condition in its order in Finance Docket No. 33556, the Canadian National's application to acquire the Illinois Central.

Since that time, other cross-border rate disparities have arisen with CP Rail. Significant rate spreads on wheat now exist between North Dakota and Saskatchewan. North Dakota may have little recourse in this case because it is more a matter of disparity than it is with the reasonableness of an individual rate.

Canada has a totally different approach to grain marketing than we do in the U.S. and its rate reasonableness tests on grain are far different than ours.

When combined with border crossing issues and marketing systems that make it impossible for U.S. farmers to sell their grain to Canadian elevators, rate spreads of several cents per bushel on shipping points that are within a few miles of each other make it impossible for U.S. farmers to compete with their Canadian neighbors to various markets. This situation exists even though the farmers involved truly are neighbors – their farms may be separated by only an imaginary line called the 49th Parallel.

North Dakota believes that the Board should act to insure rate and service parity in geographic regions and industries that span the border and which are served on both sides of the border by a merged carrier. Rules should be put in place to allow aggrieved U.S. shippers to compete effectively with their counterparts on the other side of the border.

Acquisition Premiums - History indicates that carriers are willing to pay huge premiums to acquire their competitors. To the extent that competition is reduced, the resulting carrier is then in a much better position to charge higher rates to finance the transaction. Obviously, shippers pay the premium.

The rules proposed in this case do not address acquisition premiums. North Dakota believes they should.

The incentive for future mergers should be increased efficiencies. It is these efficiencies that should enhance carrier viability and stockholder returns. Carriers should not look to captive shippers to finance premium payments. Rates should cover associated operating costs and provide the carrier with a reasonable return on its investment. To the extent that the carrier paid more than the reasonable value of the property, it should not be able to recoup those costs via higher rates from its captive shippers.

North Dakota suggests that a rule be promulgated to provide that acquisition premiums are to be considered “below the line” expenses in rate cases and in determining revenue adequacy. If premiums are paid, they should be the responsibility of the company’s stockholders and not its shippers.

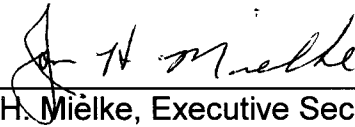
Specifics – The media has suggested that the proposed rules are short on specifics and will, if enacted as drafted, lead to years of litigation that will be extremely costly and time consuming. This occurrence would benefit the rail industry because litigation is something that railroads are extremely good at.

North Dakota suggests that the Board should, whenever possible, provide details that will help minimize the need for further interpretive action by the Board or the Courts.

Conclusion – North Dakota commends the Board for its efforts in this proceeding. The changed economic and operating environment that has evolved over the past twenty years in the rail industry truly warrants a paradigm shift in how the Board perceives and processes proposed mergers. A similar shift is warranted in rate complaint proceedings and complaints against unreasonable carrier practices related to demurrage rules, volume requirements, reciprocal switching, etc.

Certificate of Service

I certify that copies of the foregoing statement have been sent by first-class U.S. mail to all parties of record in STB Ex Parte No. 582 (Sub-No. 1).



Jon H. Mielke, Executive Secretary
North Dakota Public
Service Commission

11/15/00

Date